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AGROVENUS LLP

v.

PACIFIC INTER-LINK SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
AZIAH ALI JCA
ANANTHAM KASINATHER JCA
C [CIVIL APPEALS NO: W-02(NCC)-176-01-2012 &
W-02(NCC)-177-01-2012]
7 JANUARY 2014

D ***ARBITRATION:*** *Arbitral tribunal - Jurisdiction - Parties entered into sales contract - Dispute as to whether there was reduction of freight rate component agreed in sales contract - Whether arbitral tribunal had jurisdiction to determine dispute - Respondent only raised objection to jurisdiction of arbitral tribunal in High Court and not at proceedings before arbitral tribunal - Whether doctrine of estoppel applied - Whether*
E *respondent failed to provide proof of why recognition or enforcement of award ought to be refused - Arbitration Act 2005, ss. 38 & 39(1)(a)*

F ***ARBITRATION:*** *Award - Recognition or enforcement of - Objection to jurisdiction of arbitral tribunal - Parties entered into sales contract - Dispute as to whether there was reduction of freight rate component agreed in sales contract - Whether arbitral tribunal had jurisdiction to determine dispute - Respondent only raised objection to jurisdiction of arbitral tribunal in High Court and not at proceedings before arbitral tribunal - Whether doctrine of estoppel applied - Whether respondent failed to provide proof*
G *of why recognition or enforcement of award ought to be refused - Arbitration Act 2005, ss. 38 & 39(1)(a)*

The parties entered into a sale contract dated 3 April 2009 for the sale of Palm Olein and Palm Kernel Oil. The sale contract contained an arbitration agreement. The dispute submitted to the
H arbitration by the appellant (Food Ingredients LLC) and the respondent (Pacific Inter-Link Sdn Bhd) was whether, at a meeting on 10 April 2009 in Istanbul, the respondent as seller, had orally agreed to give the appellant a discount of USD30 per tonne in respect of adjustment of the freight component. The
I arbitral tribunal concluded that the respondent had orally agreed to give the said discount and on this basis, it awarded the sum of

USD180,768.42 to the appellant. By an originating summons, the appellant had applied, pursuant to s. 38 of the Arbitration Act 2005 ('the Act'), to recognise and enforce an award it had obtained against the respondent ('the award'). The application was dismissed by the High Court on objections raised by the respondent under s. 39(1)(a)(ii), (iv) and (v) of the Act. The High Court held that the arbitral tribunal had no jurisdiction to make the award as the arbitration agreement did not extend to the disputes raised in the arbitration. The appellant thus appealed to this court.

Held (allowing appeals with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) An applicant for recognition or enforcement of an award must first satisfy the court that there is an award and an arbitration agreement that authorised it. That would show that the tribunal that made the award sought to be recognised and enforced was the tribunal referred to in the arbitration agreement. Although an objection as to jurisdiction of the arbitral tribunal could be argued on the basis of the terms of the arbitration agreement, it was accepted that a formalistic approach to compliance with s. 38 of the Act, by production of the copy of the award and the sale contract relating to the transaction in dispute and containing an arbitration agreement, sufficed under s. 38, as *prima facie* proof. (para 13)

(2) The dispute whether there was a reduction of freight rate component in a sale price agreed in the sale contract was necessarily a dispute or disagreement which arose out of the sale contract or in relation to it and may properly be taken to the arbitral tribunal under the sale contract. Hence, the oral agreement of 10 April 2009 was to be read with the sale contract of 3 April 2009. Accordingly, the arbitration agreement in the sale contract of 3 April 2009 applied and the arbitral tribunal had jurisdiction to determine the dispute or disagreement on the oral agreement for reduction of the freight component of the price under the sale contract of 3 April 2009. (paras 25 & 26)

(3) The respondent raised the objection as to the jurisdiction of the arbitral tribunal for the first time at the High Court in Malaysia where the appellant sought recognition or enforcement of the award by the arbitral tribunal. Given that arbitral tribunal proceedings are not informal proceedings, but are undertaken by parties with the clear intention of obtaining a decision that settles the dispute between the parties, parties cannot be unaware if the arbitral tribunal lacks jurisdiction because jurisdiction is conferred by the parties. Further, the fact of failure to object at the proceedings before the arbitral tribunal and thus causing all parties to act on the basis the respondent accepted that the arbitral tribunal had jurisdiction or scope certainly did not commend itself to an exercise of discretion in favour of the respondent to refuse recognition or enforcement of the award. It called properly for the application of the doctrine of estoppel. (para 30)

(4) The respondent failed to provide to the High Court proof of why recognition or enforcement of the award under s. 38 ought to be refused under s. 39(1)(a) of the Act. Hence, the High Court ought not to have refused to recognise or enforce the award. The orders of the High Court were therefore set aside. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Pihak-pihak telah memasuki kontrak jualan bertarikh 3 April 2009 bagi penjualan Palm Olein dan Palm Kernel Oil. Kontrak jualan mengandungi perjanjian timbang tara. Pertikaian yang telah dikemukakan kepada timbang tara oleh perayu (Food Ingredients LLC) dan responden (Pacific Inter-Link Sdn Bhd) adalah sama ada, dalam satu mesyuarat pada 10 April 2009 di Istanbul, responden sebagai penjual, telah bersetuju secara lisan untuk memberikan diskaun sebanyak USD30 kepada perayu bagi setiap tan metrik bagi penyelarasan komponen. Tribunal timbang tara memutuskan bahawa responden telah secara lisan bersetuju untuk memberikan diskaun tersebut dan atas alasan ini, telah mengawardkan jumlah USD180,768.42 kepada perayu. Melalui satu saman pemula, perayu telah memohon, di bawah s. 38 Akta Timbang Tara 2005 ('Akta'), untuk mengiktiraf dan menguatkuasakan award yang telah diperolehi terhadap responden ('award'). Permohonan telah ditolak oleh Mahkamah Tinggi atas bantahan yang telah dibangkitkan oleh responden di bawah s. 39(1)(a)(ii),

(iv) dan (v) Akta. Mahkamah Tinggi memutuskan bahawa tribunal timbang tara tidak mempunyai bidang kuasa untuk membuat award kerana perjanjian timbang tara tidak diperluaskan untuk meliputi pertikaian yang dibangkitkan dalam timbang tara. Perayu, oleh itu, merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Pemohon untuk pengiktirafan dan penguatkuasaan award harus memuaskan mahkamah bahawa terdapat award dan perjanjian timbang tara yang memberinya kuasa. Ini akan menunjukkan bahawa tribunal yang telah membuat award yang dituntut pengiktirafan dan penguatkuasaan adalah tribunal yang dirujuk dalam persetujuan timbang tara. Walaupun bantahan terhadap bidang kuasa tribunal timbang tara boleh dihujahkan atas dasar terma persetujuan timbang tara, ia adalah diterima bahawa pendekatan formal dari segi pematuhan s. 38 Akta, melalui pengemukaan salinan award dan kontrak jualan berkaitan transaksi yang dipertikaikan dan mengandungi perjanjian timbang tara, adalah memadai di bawah s. 38, sebagai bukti *prima facie*.

(2) Pertikaian sama ada terdapat pengurangan kadar komponen kargo dalam harga jualan yang dipersetujui dalam kontrak jualan adalah pertikaian atau percanggahan yang timbul daripada kontrak jualan atau berkaitan dengannya dan boleh dibawa ke tribunal timbang tara di bawah kontrak jualan. Oleh itu, persetujuan lisan bertarikh 10 April 2009 harus dibaca dengan kontrak jualan 3 April 2009. Berikutan itu, persetujuan timbang tara dalam kontrak jualan 3 April 2009 digunapakai dan tribunal timbang tara mempunyai bidang kuasa untuk menentukan pertikaian atau percanggahan atas persetujuan lisan bagi pengurangan harga jualan kadar komponen kargo di bawah kontrak jualan 3 April 2009.

(3) Responden menimbulkan bantahan berkenaan bidang kuasa tribunal timbang tara untuk kali pertama di Mahkamah Tinggi Malaysia di mana perayu menuntut pengiktirafan atau penguatkuasaan award oleh tribunal timbang tara. Memandangkan prosiding tribunal timbang tara adalah prosiding yang formal, tetapi ditanggung oleh pihak-pihak yang terlibat dengan niat jelas untuk memperolehi keputusan bagi

menyelesaikan pertikaian di antara pihak-pihak, pihak-pihak tersebut tidak boleh tidak sedar jika tribunal timbang tara tidak mempunyai bidang kuasa kerana bidang kuasa telah diberikan oleh pihak-pihak yang terlibat. Selanjutnya, fakta kegagalan membuat bantahan di prosiding di hadapan tribunal timbang tara dan menyebabkan semua pihak yang terlibat bertindak atas dasar bahawa responden telah menerima bahawa tribunal timbang tara mempunyai bidang kuasa atau skop pasti tidak menyokong pelaksanaan budi bicara yang berpihak kepada responden untuk menolak pengiktirafan dan penguatkuasaan award. Ia mengalu-alukan pemakaian doktrin estopel.

(4) Responden gagal mengemukakan bukti kepada Mahkamah Tinggi mengapa pengiktirafan atau penguatkuasaan award di bawah s. 38 harus ditolak di bawah s. 39(1)(a) Akta. Oleh itu, Mahkamah Tinggi tidak sepatutnya menolak pengiktirafan atau penguatkuasaan award. Perintah mahkamah dengan itu adalah diketepikan.

Case(s) referred to:

Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd [2006] 3 SLR 174 ***(refd)***
Ashville Investments Ltd v. Elmer Contractors Ltd [1989] 1 QB 488 ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Capital Trust Investments Ltd v. Radio Design TJ AB [2002] 2 All ER 159 ***(refd)***
Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA 755 ***(refd)***
Dardana Ltd v. Yukos Oil Co [2002] 2 Lloyd's Rep 326 ***(refd)***
Denmark Skibstekniske Konsulenter A/S Likvidation v. Ultrapolis 3000 Investments Ltd [2010] 3 SLR 661 ***(refd)***
Faghirzadeh v. Rudolf Woolf SA (Pty) Ltd [1977] 1 Lloyd's Rep 630 ***(refd)***
Fiona Trust & Holding Corp v. Yuri Privalov [2007] 4 All ER 951 HL ***(refd)***
Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd [2010] SGHC 304 ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
Rustall Trading Ltd v. Gill & Duffus SA [2000] 1 Lloyd's Rep 14 ***(refd)***
Strandore Invest A/S and Others v. Soh Kim Wat [2010] SGHC 151 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 38, 39(1)(a)(ii), (iv), (v)
Rules of Court 2012, O. 69 r. 6(l)(a)
International Arbitration Act [Sing], s. 30(l)(b)
Arbitration Act [UK], ss. 31, 73

For the appellant - WM Chang (Hor Shirley with him); M/s Raja, Darryl & Loh
For the respondent - Arun Krishnalingam; M/s Sativale Mathew Arun

[Appeals from High Court, Kuala Lumpur; Originating Summons No: 24NCC(ARB)-37-10-2011 & 24NCC(ARB)-25-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] At the commencement of the hearing of the appeal, the court was informed by the parties that they agree that the decision in civil appeal No. W-02(NCC)-177-01/2012 will apply to and binds the parties in civil appeal No. W-02(NCC)-176-01-2012.

Brief Background

[2] The parties had entered into a sale contract dated 3 April 2009 for the sale of palm olein and palm kernel oil. The price of palm olein at USD849.75 per tonne and palm kernel oil at USD820.50 per tonne included freight charges. The sale contract contained an arbitration agreement. The dispute submitted to the arbitration by the appellant and the respondent was whether, at a meeting on 10 April 2009 in Istanbul, the respondent Pacific Inter-Link Sdn Bhd as seller, had agreed orally to give the appellant a discount of USD30 per tonne in respect of adjustment of the freight component.

[3] The arbitration was conducted on documents only. The arbitral tribunal concluded that the respondent had orally agreed to give the discount of USD30 per tonne. On this basis, it awarded the sum of USD180,768.42 to the appellant.

[4] By an originating summons on 15 August 2011, the appellant food ingredients LLC had applied, pursuant to s. 38 of the Arbitration Act 2005 ("the Act"), to the High Court to recognise and enforce an award it had obtained against the respondent (the award).

[5] The application was dismissed on 16 December 2011 with costs by the High Court on objections raised by the respondent under s. 39(1)(a)(ii), (iv) and (v) of the Act. The High Court held that the arbitral tribunal had no jurisdiction to make the award as the arbitration agreement did not extend to the disputes raised in the arbitration.

[6] The appellant appealed to this court.

[7] After hearing the parties, we allowed the appeals with costs, set aside the orders of the High Court and entered judgment in terms of the originating summons of 15 August 2011. We maintained costs RM10,000 in the court below and awarded costs in the sum of RM7,500 in this court for each appeal.

[8] The following are our reasons.

The Arbitration Act 2005 (Act 646)

[9] The appellant's application was made under s. 38 of Act for the award to be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

[10] The respondent requested a refusal under s. 39 which provides:

> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked-
>
> (a) where that party provides to the High Court proof that-
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
>
> [(1)(a)(ii) Am. Act A1395: s.8 - Prior text read - "the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;"]
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

[(1)(a)(v) Am. Act A1395: s. 8 - Prior text read - "subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;"]

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[(3) Ins. Act A1395: s.8]

[11] It was submitted for the respondent that upon similar provision in Singapore, it was held in *Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd* [2010] SGHC 304, that there are two stages regarding the enforcement proceedings, with

A the first stage of enforcement pertaining to the initial grant of leave to enforce, and the second stage of enforcement pertaining to the stage where a party against whom an award was made resists the enforcement, and that in *Denmark Skibstekniske Konsulenter A/S Likvidation v. Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661, the B learned judge, at the first stage of the enforcement, determined if the arbitration clause in the standard conditions formed part of the new agreement before it can be satisfied that the arbitration had been produced as required by s. 30(l)(b) of the International Arbitration Act of Singapore and O. 69 r. 6(l)(a) of the Rules of C Court 2012. It was also held that in doing so, the court would take, as in *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd* [2006] 3 SLR 174, and *Dardana Ltd v. Yukos Oil Co* [2002] 2 Lloyd's Rep 326, a "mechanistic" or formalistic approach as to compliance with s. 38 of the Act, primarily to produce the original award or D a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof. The submission for the respondent went on to discuss at some length the decision and principles in *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA E 755, a decision of the Supreme Court of the United Kingdom, followed in *Strandore Invest A/S and Others v. Soh Kim Wat* [2010] SGHC 151 and *Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd* (*supra*).

F **[12]** The High Court considered *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* (*supra*) at some length. The fact matrix of the case differs substantially from the present, and we do not think therefore that the present case necessarily warrants a consideration of which G principles may be adopted and which may not.

[13] In our view, s. 38 reflects the obvious. An applicant for recognition or enforcement of an award must first satisfy the court that there is an award and an arbitration agreement that authorised it. That would show of the tribunal that made the H award sought to be recognised and enforced is the tribunal referred to in the arbitration agreement. Although an objection as to jurisdiction of the arbitral tribunal could be argued on the basis of the terms of the arbitration agreement, we accept that a formalistic approach to compliance with s. 38, by production of I the copy of the award and the sale contract of 3 April 2009 relating to the transaction in dispute and containing an arbitration agreement suffices under s. 38 as *prima facie* proof.

[14] We held the view that the second stage is s. 39, which deals with the request and grounds relied upon for refusal of the recognition or enforcement sought, and that this second stage is where questions relating to jurisdiction of the arbitral tribunal as well as whether, *inter alia*, the arbitral tribunal exceeded its jurisdiction or dealt with any dispute not contemplated or not falling within the terms of the submission to arbitration may properly be addressed.

[15] We make the observation that the division under ss. 38 and 39 into two stages is to simplify the application for recognition or enforcement of an award and the process of dealing with exercise of discretion to refuse that application. This is consistent with recognition of such arbitrations as a specialised tribunal for resolution of commercial disputes or disagreements by those in commerce.

[16] The respondent, in this case, is clearly the party against whom the recognition or enforcement of the award is invoked and who is requesting refusal. Section 39(1)(a) requires that it must satisfy the High Court with proof of any of the grounds set out in paras. (i) to (vii) thereof that it relied upon. In this case, para. (ii) was relied upon.

Dispute Submitted To Arbitration

[17] As mentioned earlier above, the dispute submitted to the arbitration by the parties was whether at a meeting on 10 April 2009 in Istanbul, the respondent Pacific Inter-Link Sdn Bhd as seller had agreed orally to give the appellant a discount of USD30 per tonne in respect of adjustment of the freight component in the price agreed in the sale contract of 3 April 2009. The arbitral tribunal found on the evidence put before it by the parties, that the respondent had, and awarded the sum of USD180,768.42.

[18] The sum was not paid, forcing the appellant to seek recognition or enforcement of the award under s. 38 of the Act.

Refusal To Recognise And Enforce Award

[19] However, when the appellant applied under s. 38 of the Act to the High Court, the respondent as the party against whom s. 38 is invoked s. 39(1)(a)(ii) and requested that the application be refused. To succeed, s. 39(1)(a) requires the respondent to provide proof to the High Court of that ground relied upon.

[20] Under s. 39(1)(a)(ii), the respondent's approach was to question the jurisdiction of the arbitral tribunal. The respondent did so in this way:

(a) The sale contract of 3 April 2009 was effectively spent by 10 April 2009 as payment was made, the product shipped;

(b) There was no agreement to reduce the freight component; and

(c) Even if there were an oral agreement, there was no consideration.

[21] To put it another way, a price reduction agreement of the freight component, if any, is a new agreement and:

(a) There is no such agreement as there is no evidence and there is no consideration for the agreement; and therefore any matter as to existence of any such is not within the jurisdiction of the arbitral tribunal under the sale contract of 3 April 2009; and alternatively

(b) If it is accepted there is such an oral agreement, there is no arbitration agreement therein to appoint the arbitral tribunal under the sale contract of 3 April 2009 as the arbitral tribunal thereunder.

[22] The appellant's answer to the issue of lack of jurisdiction being raised is that the issue had never been addressed at any time by the respondent before the arbitral tribunal, and therefore ought not to be considered. The respondent's response is that since the award was made on 12 January 2011 and the present s. 39(1)(a)(ii) came into effect on 1 July 2011, the question of validity of the arbitration agreement must be decided under the previous provision that it be decided under the laws of Malaysia.

Our Findings

[23] We turn to the question of the request for the exercise of the discretion to refuse recognition or enforcement of the award. The respondent relied on the ground that the arbitral tribunal had no jurisdiction. The appellant relied upon the ground that the discretion to refuse ought not to be exercised.

The Arbitral Tribunal Had No Jurisdiction

[24] We agree that the question whether the arbitral tribunal was conferred with jurisdiction or had jurisdiction, is a matter for an independent consideration by the High Court requested to exercise its discretion to refuse recognition or enforcement of an award, and its own decision as to whether it had jurisdiction is immaterial.

[25] In considering whether the arbitral tribunal had jurisdiction, we considered whether there is or is not a new agreement. We concluded that even if the oral agreement is a new agreement, it is not one that emerged and existed in isolation for the following reasons:

(a) if an agreement is as to reduction of a payment under another agreement, then such agreement is to be read together with that other agreement not only for the reason that no reduction arises unless there is payment due under the other agreement, but in the event of need for interpretation of words and terms used, to ensure that a meaning that is consistent and complementary can be applied;

(b) clause 6.1 of the sale contract of 3 April 2009 provided that any dispute or disagreements which may arise out of the agreement or in relation to it, shall be settled by mutual consultations failing which the dispute shall be settled by arbitration in accordance with the regulations and procedures of FOSFA in London and as per the English Law. Rules of English law are applicable to the contract.

(c) The dispute whether there is a reduction of freight rate component in a sale price agreed the sale contract is necessarily a dispute or disagreement which arose out of the sale contract or in relation to it and may properly be taken to the arbitral tribunal under the sale contract. See *Faghirzadeh v. Rudolf Woolf SA (Pty) Ltd* [1977] 1 Lloyd's Rep 630; *Ashville Investments Ltd v. Elmer Contractors Ltd* [1989] 1 QB 488; *Capital Trust Investments Ltd v. Radio Design TÆ AB* [2002] 2 All ER 159; *Fiona Trust & Holding Corp v. Yuri Privalov* [2007] 4 All ER 951 HL.

[26] Hence, the oral agreement of 10 April 2009 is to be read with the sale contract of 3 April 2009. Accordingly, the arbitration agreement in the sale contract of 3 April 2009 applied and the arbitral tribunal had jurisdiction to determine the dispute or disagreement on the oral agreement for reduction of the freight component of the price under the sale contract of 3 April 2009.

The Discretion To Refuse Ought Not To Be Exercised

[27] We held that an amendment is not given retrospective effect unless it is shown that a retrospective effect is intended by Parliament. See *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339. That not having been demonstrated, a retrospective effect cannot be applied to the amended s. 39(1)(a)(ii). That being so, the effect of ss. 31 and 73 of the English Arbitration Act providing that the right to objection on grounds of jurisdiction may be lost if not taken up before the arbitral tribunal within the time frames allowed is not imported by the s. 39(1)(a)(ii) for consideration by the High Court.

[28] But this alone does not dispose of the matter, because even though not imported by s. 39(1)(a)(ii) as it presently stands, the parties to the sale contract of 3 April 2009 had made provision by cl. 6.1 to subject the sale contract and its arbitration agreement to English law. Clause 6.1 of the sale contract of 3 April 2009 provided that:

> Any dispute or disagreements, which may arise out of this agreement or in relation to it, shall be settled by mutual consultations. If an agreement is not reached, the dispute shall be settled by arbitration in accordance with the regulations and procedures of FOSFA in London and as per the English Law, Rules of English law are applicable to the present contract.

[29] If English law is applied, then the objection as to jurisdiction cannot be raised before the High Court because the respondent had not done so before the arbitral tribunal nor explained why it was not raised earlier.

[30] Even if we are wrong as to the above, and the previous s. 39(1)(a)(ii) that is applicable requires a consideration of the jurisdiction of the arbitral tribunal under the laws of Malaysia, we held that such a consideration of the exercise of the judicial

discretion under s. 39(1)(a) whether to refuse recognition or enforcement of an award on the grounds of lack of jurisdiction of the arbitral tribunal calls for consideration of the following: A

(a) The jurisdiction or scope of an arbitral tribunal is conferred by the agreement of the parties to give and to accept its jurisdiction. The first source of the agreement is the terms of the arbitration clause. That agreement may be express, or implied. The fact there is or is not an agreement, does not prohibit the parties from reaching subsequent agreement conferring jurisdiction or additional jurisdiction or scope to the arbitral tribunal. That agreement may be implied where both parties did not object to but instead submitted upon the additional matter or scope to the arbitral tribunal. B C

(b) The respondent, in this case, raised the objection as to the jurisdiction of the arbitral tribunal for the first time at the High Court in Malaysia when the appellant sought recognition or enforcement of the award by the arbitral tribunal. Given that arbitral tribunal proceedings are not informal proceedings, but are undertaken by parties with the clear intention of obtaining a decision that settles the dispute between the parties, parties cannot be unaware if the arbitral tribunal lacks jurisdiction because jurisdiction is conferred by the parties. D E

(c) Yet no explanation was given for the failure to object to jurisdiction before the arbitral tribunal, particularly since English law would require the respondent to have made the objections as to jurisdiction before the arbitral tribunal or lose the right to make the objection. The objection made only after having participated fully in the arbitration at all times, and even then only when the appellant sought recognition or enforcement of the award by the High Court suggests the respondent took part in the proceedings before the arbitral tribunal while keeping it up its sleeve the objection as to jurisdiction to be used to challenge the award if the award went against it. We agree with the description in *Rustall Trading Ltd v. Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 that this is a fundamental principle of objection. A party cannot seek to have its cake and at the same time eat it too. F G H

(d) Furthermore, the fact of failure to object at the proceedings before the arbitral tribunal and thus causing all parties to act on the basis the respondent accepted that the arbitral tribunal I

had jurisdiction or scope certainly does not commend itself to an exercise of discretion in favour of the respondent to refuse recognition or enforcement of the award. It calls properly for the application of the doctrine of estoppel as enunciated in *Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 FC.

[31] We held that the above results in the respondent failing to provide to the High Court proof of why recognition or enforcement of the award under s. 38 ought to be refused under s. 39(1)(a) of the Act.

[32] Accordingly, the High Court ought not to have refused to recognise or enforce the award, and made the orders above stated.